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WALGREEN CO.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SKILSTAF, INC., on behalf of itself
and all others similarly situated,

Plaintiff,

V.

CVS CAREMARK CORP.; LONGS DRUG STORE CORPORATION; THE KROGER CO.; NEW ALBERTSON'S INC.; SUPERVALU, INC.; WALGREEN CO., and WALMART STORES, INC.,

Defendants.

CASE NO. CV 09-2514 (SI)

**WALGREEN CO.'S
SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS**

[Notice of Motion, combined
Memorandum of Points and Authorities,
Request for Judicial Notice Filed
Concurrently]

Date: January 15, 2010
Time: 9:00 a.m.
Courtroom: 10, 19th Floor

Judge: Hon. Susan B. Illston
Complaint Filed: June 5, 2009

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Walgreen Company (“Walgreens”) submits this supplemental¹
 3 memorandum of points and authorities in support of defendants’ motion to dismiss
 4 because, according to the complaint, Walgreens is in the odd position of being an
 5 innocent defendant.

6 The complaint omits Walgreens from its RICO allegations and causes of
 7 action. Indeed, the complaint contains no allegation that Walgreens committed any
 8 wrongdoing whatsoever, or even was aware that any other person committed any
 9 wrongdoing. Complaint at *passim*. Instead, the complaint alleges only that
 10 Walgreens unknowingly benefitted from the alleged RICO scheme and should be
 11 subject to restitution under the third cause of action for Unjust Enrichment / Money
 12 Had and Received because it would be inequitable for Walgreens to keep any extra
 13 money it was paid as a result of the alleged scheme. Complaint at ¶¶ 8 (defining
 14 “RICO Defendants” as excluding Walgreens), 48 (identifying Walgreens’ state of
 15 incorporation and places of business), 180 (identifying Walgreens as a customer of
 16 McKesson), and 336-48 (unjust enrichment allegations).

17 The elements of a claim based on unjust enrichment are the “receipt of a
 18 benefit and the unjust retention of the benefit at the expense of another.” *Peterson*
 19 *v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1593 (2008). “However, the ‘mere
 20 fact that a person benefits another is not of itself sufficient to require the other to
 21 make restitution therefor.’” *Marina Tenants Assn. v. Deauville Marina*
 22 *Development Co.*, 181 Cal.App.3d 122, 134 (1986) (internal citation omitted). As
 23 was explained in *First Nationwide Sav. v. Perry*, 11 Cal. App. 4th 1657 (1992),
 24 “[While] restitution may be required when the person benefitting from another’s

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 26 ¹ The defendants’ omnibus memorandum of points and authorities and The Kroger Co.’s
 27 supplemental memorandum of points and authorities discuss several grounds for dismissal of the only
 28 claim asserted against Walgreens, the third cause of action for Unjust Enrichment / Money Had and
 Received. Any one of those grounds should lead to dismissal of Walgreens from this action, and
 Walgreens joins in those briefs. This memorandum is intended to supplement those discussions by briefly
 addressing the specific issue of Walgreens’ innocence.

1 mistake knew about the mistake and the circumstances surrounding the unjust
 2 enrichment . . . , innocent recipients may be treated differently than those persons
 3 who acquire a benefit with knowledge.” *Id.* at 1663-64.

4 In *City of Hope Nat'l Medical Center v. Superior Court*, 8 Cal. App. 4th 633,
 5 637 (1992) (“*City of Hope*”), the court considered an insurer’s claim for restitution
 6 based on unjust enrichment where a hospital performed services for a patient,
 7 submitted a claim for those services to the insurance company, and the insurer paid
 8 the claim but later decided the services were not covered and the claim should not
 9 have been paid. *Id.* at 636. Because the hospital had provided the services, and had
 10 no notice of the insurer’s coverage mistake at the time the payment was made, the
 11 *City of Hope* court held that the insurer could not seek restitution from the hospital.
 12 *Id.* at 637; *see also Federated Mutual Ins. Co. v. Good Samaritan Hosp.*, 191 Neb.
 13 212, 214 N.W.2d 493, 495 (1974) (similar); *Lincoln Nat'l Life Ins. Co. v. Brown*
 14 *Schools, Inc.*, 757 S.W.2d 411, 414 (Tex.Civ.App. 1988) (similar); *National Ben.*
 15 *Admrs. v. Mississippi Methodist Hosp. & Rehabilitation Ctr., Inc.*, 748 F. Supp.
 16 459, 465-66 (S.D. Miss. 1990) (similar); *Time Ins. Co. v. Fulton-DeKalb Hosp.*
 17 *Auth.*, 438 S.E.2d 149, 152 (Ga. App. 1993) (similar); *St. Mary's Medical Ctr., Inc.*
 18 *v. United Farm Bureau Family Life Ins. Co.*, 624 N.E.2d 939, 942 (Ind. Ct. App.
 19 1993) (similar); *compare Fidelity Mut. Life Ins. Co. v. Clark*, 203 U.S. 64, 71
 20 (1906) (“When property has been obtained by fraud, its true owner may recover it
 21 from any person except a *bona fide* purchaser for value, without notice [of the
 22 fraud].”). This same rule is set forth in the Restatement of Restitution:

23 “A person who has paid money to another in the performance of an
 24 agreement with a third person is entitled to restitution from the other
 25 if, because of fraud or mistake, the agreement or transfer was
 26 ineffective or was voidable and has been avoided, unless the other
 27 gave value therefor or changed his position, without notice of the
 28 cause of avoidance.”

1 Restatement 1st of Restitution, § 17 (1937).

2 The facts alleged here are even weaker than those in the *City of Hope*
 3 decision and the other authorities cited above. Here, the complaint alleges, at most,
 4 that Walgreens provided prescription drugs to beneficiaries and received from third
 5 party payors like plaintiff contracted amounts of reimbursement. The plaintiff now
 6 has decided that it was a mistake for those third party payors to have agreed to the
 7 express contract terms for that compensation. Even if that stated a basis for evading
 8 contractual obligations (and we do not believe it does), Walgreens had no notice or
 9 knowledge of any alleged mistake, and was justified in receiving the payments
 10 because it provided the prescription drugs to the beneficiaries. Walgreens,
 11 therefore, is not subject to a claim of restitution because it gave value for the money
 12 paid and had no notice of the cause of avoidance.² Restatement 1st of Restitution,
 13 § 17. Or, in the words of the *City of Hope* court, “[s]tated plainly, if it’s your
 14 mistake, you get to pay for it – unless the recipient misled you or accepted the
 15 payment knowing you didn’t owe it.” *City of Hope Nat. Medical Center*, 8
 16 Cal.App.4th at 637.

17 Furthermore, it would be bad public policy and contrary to established law
 18 were this Court to expand the unjust enrichment law to allow innocents like
 19 Walgreens to suffer the burdens (time and expense) of defending unjust enrichment
 20 suits where they delivered goods to beneficiaries and were paid the negotiated
 21 amount without any knowledge or control over the third party payors’ allegedly
 22 mistaken assumptions. *See, e.g.*, Fed. R. Civ. Proc. 1 (the Rules are to “be
 23 construed and administered to secure the just, speedy, and inexpensive

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² Indeed, Walgreens was as much a victim of the alleged RICO scheme as was plaintiff.

1 determination of every action and proceeding.”) Walgreens should be dismissed
2 from this action because the complaint does not contain facts sufficient to allege a
3 cause of action against it.

4 Dated: September 11, 2009

McDERMOTT WILL & EMERY LLP

6 By: /s/ Matt Oster

7 MATT OSTER

8 Attorneys for WALGREEN CO.

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